Commonwealth of Massachusetts
State Ethics Commission

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CONFLICT OF INTEREST OPINION
EC-COI-92-28*

FACTS:

A private, non-profit corporation called The Boston Organizing Committee (Committee) has been created by corporate leaders in the Commonwealth to organize an effort to bring a future international summer Olympics to the Boston area. The Committee believes that if the Commonwealth serves as a host to the Olympic games it will have a significant economic impact on the Commonwealth, will create new jobs, and will highlight the many physical, recreational and cultural assets in the area. The Committee is currently conducting fundraising activities in order to raise the capital necessary to "solidify its relationship with the U.S. Olympic Committee, lead and organize the many corporate, civic and athletic groups necessary to serve as hosts, and prepare Boston's bid." The Committee is also involved in public relations activity to increase the number of international athletic events in this area in support of its Olympic bid.

The Governor is interested in signing a Committee solicitation letter which will be sent to corporate entities in the Commonwealth, requesting that each corporation pledge a sum of money, such as $25,000 per year, over the next three years to the Committee. Other signers of the letter will include local and federal public officials and one of the corporate founding members of the Committee. The Committee plans to send the letter to many individuals and corporations that are within the regulatory jurisdiction of, or have contracts with, one or more state agencies under the Governor's authority.

QUESTION:

Does G.L. c. 268A permit the Governor to sign this solicitation letter?

ANSWER:

No.

DISCUSSION:

Whenever a public employee participates in a solicitation, issues are raised under G.L. c. 268A, §23, which contains standards of conduct for all state, county, and municipal employees. Specifically, G.L. c. 268A, §23(b)(2) provides that a state employee may not use his official position to secure unwarranted privileges of substantial value for himself or others which are not properly available to similarly situated individuals. This provision applies to the Governor as a "state employee." G.L. c. 268A, §1(q).

"The Commission has consistently held that this provision flatly prohibits public employees from soliciting anything of substantial value from persons within their regulatory jurisdiction, because of the `inherently exploitable nature' of these situations." *EC-COI-92-12* (Board member prohibited from soliciting individuals under his regulatory authority). We have also applied this principle to solicitations by public employees, in both their public and private capacities, from others "whom they oversee in their official duties [including] subordinate employees [and] vendors . . . ." *EC-COI-92-7* (legislator prohibited from soliciting private business relationship with legislative aide). *See also EC-COI-92-2* (legislator's financial aid committee prohibited from soliciting anyone with an interest in legislative business, broadly defined); *90-9* (state official prohibited from soliciting vendors of his agency to support political candidate); *82-124* (County Commissioner prohibited from privately selling insurance to county vendors whose contracts he oversees); *81-66* (Corrections officer prohibited from catalog selling to inmates within custody). We have repeatedly explained the rationale for this prohibition:

> First, such conduct raises questions about the public official's objectivity and impartiality. For example, if lay-offs or cutbacks are necessary, an issue can arise regarding who will be terminated, the subordinate or vendor who has a significant private relationship with the public employee, or another person who does not enjoy such a relationship. At least the appearance of favoritism becomes unavoidable. Second, such conduct has the potential for serious abuse. Vendors and subordinates may feel compelled to provide private services where they would not otherwise do so. And even if in fact no abuse occurs, the possibility that the public official may have taken unfair advantage of the situation can never be completely eliminated. Consequently, the appearance of impropriety remains.

EC-COI-92-7; In re Garvey, 1990 SEC 478, 479-80; *In re Keverian*, l990 SEC 460, 462 (citations omitted).

We now clarify that this principle applies to solicitations for the benefit of non-governmental entities that arguably perform a public purpose, unless a statute or regulation explicitly authorizes the solicitation. Regardless of the purpose of a solicitation, the dangers of compromising a public employee's impartiality and objectivity and of creating an atmosphere where potential vendors feel compelled to contribute to foster the agency's or the public employee's good will remain.[1/] Our prior opinions allowing solicitation support this conclusion. In *EC-COI-84-128*, our decision to permit a state Secretary to solicit private entities was based both on the presence of explicit statutory authorization and on the fact that the Secretary had limited regulatory authority over the private organizations. In *EC-COI-83-102*, we decided that a state legislator could sign a letter to be used to solicit local merchants to support a raffle in a voter registration drive, but we indicated that the solicitation may raise issues under §23 "where the solicitation is made to a merchant whose special legislation or other particular matter is about to be voted upon by the endorsing legislator."[2/]

Here, virtually all of the corporations and individuals to be solicited are inevitably within the regulatory jurisdiction of state agencies responsible to the Governor — for example, the Department of Revenue, the Commissioner of which is appointed, and may be removed without cause, by the Secretary of Administration and Finance with the Governor's approval. G.L. c. 14, §2. Many other recipients of the solicitation will have present or prospective contracts with state agencies similarly under the Governor's control. While we do not suggest that any agency action would depend on a recipient's response to this solicitation, our concern about its "inherently exploitable nature" remains. Therefore, the Governor may not sign this solicitation letter, in either his public or private capacity.[3/]

Our decision would be different if the Legislature (or an agency authorized by the Legislature to adopt quasi-legislative regulations) explicitly authorized this solicitation, either generally or specifically.[4/] For example, the Legislature might authorize the formation of an Olympic Steering Committee and allow the Committee to solicit funds; authorize an executive agency to develop an Olympic bid; or merely authorize such solicitations on behalf of non-profit entities that promote tourism.[5/] Here, no such authorization exists; in fact, the grants to such entities authorized by G.L. c. 23A, §14 are explicitly made "subject to appropriation" by the Legislature. Under the Massachusetts Constitution, "the power to order social priorities, and to focus the energies of society into the accomplishment of designated objectives or programs is entrusted to the Legislature through the enactment of laws according to prescribed procedures." *Opinion of the Justices*, 375 Mass. 827, 832 (1978). *See* Part II, c. 1, §1, art. 4 of the Constitution. *See also* St. 1987, c. 371; St. 1989, c. 488 (statutes establishing "linkage" programs in Boston and Medford respectively, and thus authorizing municipal employees to require specified payments for public purposes from regulated developers).

We note that our conclusion is consistent with regulations recently adopted by the federal Office of Government Ethics, entitled "Standards of Ethical Conduct for Employees of the Executive Branch." 5 CFR part 2635. *See EC-COI-87-32* (looking to federal regulation for guidance in construing G.L. c. 268A). These regulations address the use of official position for private gain and fundraising by federal employees. Specifically, 5 CFR 2635.808 addresses fundraising in a federal employee's official and private capacities. The regulation defines fundraising as "the raising of funds for a non-profit organization, other than a political organization . . . ." A public employee may fundraise in his official position and use his official title and authority **if** he is authorized to participate in his official capacity by (among other things) a statute or regulation. A public employee may fundraise in his private capacity provided that he does not personally solicit from a subordinate or a "prohibited source." "Prohibited source" is defined as any person who is seeking official action by the employee's agency; does business or seeks to do business with the employee's agency; conducts activities regulated by the employee's agency; has interests which may be explicitly affected by performance or nonperformance of the employee's official duties; or is an organization with a majority of members whose interests are described above. In essence, unless specifically authorized, a public employee may not target for solicitation purposes those over whom he has authority or oversight or with whom he has a regulatory relationship.

We emphasize that our conclusion certainly does not prevent the Governor, or any other policy making public official, from publicly announcing his support for or endorsement of a non-profit endeavor that, in his judgment, furthers some public purpose. *See Anderson v. City of Boston*, 376 Mass. 178, 199 (1978), *appeal dismissed*, 439 U.S. 1069 (1979) (recognizing free speech rights of policymaking public officials, even during working hours, regarding ballot question campaign); *EC-COI-92-5* n.4 (referring to *Anderson* by analogy in applying §23[b][2] to campaign activities). The Governor, in other words, is free to state publicly his support of the goals and activities of the Boston Organizing Committee; what he may not do is sign asolicitation letter targeted, at least in part, to individuals or organizations subject to the regulatory authority of the Administration.

Date Authorized: September 10, 1992

*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

[1/]Such a solicitation is distinguishable from a vendor's offering to provide a gift to a government agency, which we have found does not violate §23. *See, e.g., EC-COI-89-23* (potential state vendor donated agency software); *89-3* (vendor donated actuarial services to agency); *84-114* (donation of artwork to agency). In contrast, this solicitation seeks to benefit, not a government agency, but a private entity.

[2/]Section 23(b)(2) also generally prohibits public employees from using official resources, including their official titles, to promote a private interest. *See EC-COI-92-12; 92-5; 84-127; 83-82; Public Enforcement Letters 92-3, 89-4; In re Buckley*, 1983 SEC 157. In view of the conclusion we have reached about the "inherently exploitable nature" of this solicitation, we have no occasion here to consider whether other circumstances, not of such an "inherently exploitable nature," might allow use of official resources to solicit for a private entity pursuant to some public purpose related to a public employee's official duties.

[3/]Of course, the Governor or any other public employee may solicit in his private capacity (i.e., without using his official title or other state resources), for example to benefit some charitable organization to which he belongs, so long as the solicitation is either general in nature (e.g., a newspaper advertisement) or otherwise not specifically directed to any person or entity that the public employee oversees. *See EC-COI-92-12* n.7.

[4/]In this connection, we note that the Legislature has in effect generally authorized elected public officials to solicit funds for political campaign purposes in their private capacities. G.L. c. 55, §13. *See EC-COI-92-12* n.10. The present opinion does not otherwise address political fundraising, which the Legislature has also regulated in G.L. c. 55, and which (as to G.L. c. 268A) we have discussed elsewhere. *See Commission Advisory No. 4* (1992); *EC-COI-92-12*.

[5/]Even when the law authorizes a solicitation, §23(b)(3) would apply if a contributor later had official discretionary dealings with the soliciting public employee (or another employee under that employee's authority). Section 23(b)(3) prohibits a public employee from engaging in conduct that gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties, but allows the employee to dispel any such impression by written public disclosure.